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IN THE UNITED STATES DISTRICT COURT

8
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10
11 IN RE ATM FEE ANTITRUST
12 LITIGATION

No. C 04-02676 CRB
ORDER

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15 With this antitrust action, filed over five years ago, Plaintiffs challenge the legitimacy
16 of the fixed interchange fees in the Star ATM network. This case has slowly wound its way
17 through several Judges and multiple rounds of dispositive motions. In the Court's most
18 recent order addressing Defendants' motion for summary judgment, the Court held that the
19 per se rule is inapplicable to Plaintiffs' claim. Plaintiffs then filed their Second Amended
20 Complaint ("SAC") which purports to allege an antitrust violation that may be sustained
21 under the rule of reason analysis.

22 Before the Court are four motions to dismiss through which Defendants challenge the
23 sufficiency of Plaintiffs' pleading. Having held oral argument on August 28, 2009 and
24 carefully considering the submissions of the parties, the Court hereby GRANTS dismissal
25 with leave to amend because Plaintiffs have failed to allege a legally adequate "relevant
26 market." The Court also GRANTS dismissal of Bank of America, N.A. ("BANA") because
27 claims against BANA are barred by the statute of limitations. Further, the Court GRANTS
28 with prejudice dismissal of the bank holding companies for failure to state a claim.

BACKGROUND¹**I. The Star Network**

This case challenges the right of a non-proprietary network to set network-wide “interchange” fees that govern the amount of money paid by an ATM card issuer – generally a bank – to a foreign ATM owner when the ATM is used by the issuer’s customer. Customers at most commercial banks receive ATM cards that allow them to make withdrawals from their accounts electronically. Typically, these ATM cards permit withdrawals not only from ATM machines at the bank where they hold their accounts, but also from ATM machines elsewhere. Such “foreign ATM transactions” involve four parties: (1) the “cardholder,” *i.e.* the customer who retrieves money from the ATM machine; (2) the “card-issuer bank,” *i.e.* that bank at which the customer holds an account and from which the customer has received an ATM card; (3) the “ATM owner,” *i.e.* the entity that owns the ATM machine from which the customer withdraws money on his account; and (4) the “ATM network,” *i.e.* the entity that administers the agreements between various card-issuer banks and ATM owners and thereby ensures that customers can withdraw money from one network member’s ATM as readily as from another’s.

Foreign ATM transactions involves multiple fees. Generally, a customer must pay two fees — one to the ATM owner for the use of that entity’s ATM machine (known as a “surcharge”), and one to the bank at which he has an account (known as a “foreign ATM fee”). But that is not all. Out of the money that a customer pays directly to his own bank, the bank then also pays two fees. The first of the bank’s fees is known as a “switch fee” and is paid directly to the ATM network. The second of the bank’s fees — and the one at issue in this lawsuit — is known as an “interchange fee” and is paid directly to the owner of the foreign ATM. Since 2003, the interchange fee has been set at \$0.46 for on-premise transactions (*i.e.*, transactions at ATMs deployed on a bank’s premises), and \$0.54 for off-premise transactions.

¹As the background information underlying this case has not changed over the last year and a half, the following recitation of the facts is largely taken from the Court’s March 24, 2008 Order. See In re ATM Fee Antitrust Litig., 554 F. Supp. 2d 1003, 1007-09 (N.D. Cal. 2008).

1 In this case, Plaintiffs contest the legality of only the interchange fee. They contend
2 that the manner in which this fee is set and administered violates antitrust laws. In their
3 SAC, Plaintiffs allege that certain members of the Star ATM network had “fixed the
4 interchange fee.” SAC ¶ 1.

5 The Star Systems, Inc. (“Star”) network of ATM services was founded by a number of
6 banks over twenty years ago. SAC ¶ 76. On February 1, 2001, Concord acquired Star by
7 purchasing all of the member Banks’ ownership interest. SAC ¶ 79. Star has over 5,400
8 members nationwide. SAC ¶ 80. It is one of approximately twenty-five ATM networks in
9 the country. SAC ¶ 75.

10 Until 1996, interchange fees and foreign ATM fees were the sole sources of revenue
11 on foreign ATM transactions for bank issuers and ATM owners. SAC ¶ 87. In 1996, Star
12 and other ATM networks dropped their bans against customer surcharges. SAC ¶ 88. As a
13 result, ATM owners began imposing surcharges, with banks now charging users of foreign
14 ATMs around one to three dollars per foreign transaction. SAC ¶ 89. Plaintiffs allege that
15 those surcharges are artificially inflated because the Star network continues to impose an
16 arbitrary interchange fee, which gets passed on to customers through the surcharges. SAC ¶
17 99. Plaintiffs further allege that the interchange fee was set through an illegal agreement of
18 the Defendants, who controlled Star’s Board of Directors. SAC ¶¶ 100-15. Plaintiffs
19 contend that the banks enforced their illegal agreement by requiring all Star members — both
20 banks and non-banks that own ATMs in the network — to abide by the fixed interchange fee.
21 Id. ¶ 62.

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23 II. Procedural History

24 On a previous motion to dismiss, this Court ruled that the Plaintiffs’ allegations, if
25 true, would establish that the Defendants had engaged in illegal price-fixing. See Brennan v.
26 Concord EFS, Inc., 369 F. Supp. 2d 1127 (N.D. Cal. 2005) (Walker, J.). In its ruling, the
27 Court first noted that the Plaintiffs’ objection is not to the existence of an interchange fee, but
28 rather to its fixed nature. Id. at 1132. In other words, Plaintiffs did not contend that it would

1 be impermissible for a card-issuing bank to compensate foreign ATM owners, but only that
2 they may not decide collectively what compensation to render. Further, the court noted that
3 the Complaint had described a “naked” attempt to fix prices, as opposed to an attempt to fix
4 price that the Star network members determined was “ancillary” to a legitimate,
5 procompetitive venture. Id. at 1133. In other words, Plaintiffs alleged that Defendants fixed
6 the interchange fee because they could, not because a fixed fee was necessary to sustain the
7 ATM network. Because the Defendants could not defend against such allegations of “naked
8 price fixing” without invoking evidence that was beyond the scope of the Complaint, the
9 Court denied the motion to dismiss. Id. at 1138.

10 Shortly after the ruling on the motion to dismiss, Defendants filed a motion for partial
11 summary judgment on the ground that, as of February 2001, the Star network ceased to be
12 owned by a group of banks but instead was operated by Concord as a proprietary network.
13 Taking a different tack, the Court issued a Memorandum and Order on November 30, 2006,
14 terminating Concord’s motion and directing the parties to address the fundamental question
15 of whether a per se analysis applies to this case. The Court observed that “if Defendants can
16 set forth evidence to support plausible, procompetitive justifications for their agreement to
17 fix the interchange fee,” then the per se rule would not apply. Mem. & Order at 5 (Docket
18 No. 360).

19 Defendants moved for summary judgment on August 3, 2007, having adduced
20 evidence bearing on the applicability of the per se rule. In an order issued on March 24,
21 2008, the Court granted Defendants’ motion and held that rule of reason analysis applies to
22 this case, thereby determining that the price-fixing challenged by Plaintiffs is not the kind of
23 naked horizontal restraint that lacks any redeeming virtue. In re ATM Fee Antitrust Litig.,
24 554 F. Supp. 2d 1003, 1016-17 (N.D. Cal. 2008).

25 Given substantial uncertainty in the law regarding which mode of analysis to apply,
26 the Court subsequently certified for appeal the issue of whether the per se or rule of reason
27 rubric should be employed in this case. The Ninth Circuit declined to take the matter up,
28 which led to Plaintiffs’ SAC.

1 Presently before the Court are four motions to dismiss. The first is a Joint Motion to
2 Dismiss filed by all Defendants. Three other parties have filed separate motions to dismiss:
3 (1) SunTrust Banks, Inc.; (2) Bank of American Corporation and Bank of America, N.A.;
4 and (3) CitiGroup, Inc.

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6 STANDARD OF REVIEW

7 A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests
8 the legal sufficiency of the pleadings. De La Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir.
9 1978). A complaint may be dismissed for failure to state a claim where the factual
10 allegations do not raise the right to relief above the speculative level. Bell Atlantic v.
11 Twombly, 550 U.S. 544, 555 (2007). Conversely, a complaint may not be dismissed for
12 failure to state a claim where the allegations plausibly demonstrate that the pleader may be
13 entitled to relief. Id. In ruling on a Rule 12(b)(6) motion, a court must construe the
14 pleadings in the light most favorable to the plaintiff, and must accept as true all material
15 allegations in the complaint, as well as any reasonable inferences to be drawn from them.
16 Broam v. Bogan, 320 F.3d 1023, 1028 (9th Cir. 2003).

17 The allegations in the complaint may not evade antitrust requirements by merely
18 alleging a bare legal conclusion. Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729,
19 736 (9th Cir. 1987). “[A] district court must retain the power to insist upon some specificity
20 in pleading before allowing a potentially massive factual controversy to proceed,”
21 particularly in light of the fact that “antitrust discovery can be expensive.” Twombly, 550
22 U.S. at 558 (internal citation and quotation omitted). Plaintiffs alleging antitrust claims must
23 set forth enough “factual matter” to “nudge[] their claims across the line from conceivable to
24 plausible.” Id. at 570.

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DISCUSSION

Section 1 of the Sherman Act provides in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1. In order to establish a claim under Section 1, a plaintiff must demonstrate: (1) there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce. Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001). Pursuant to the Court's Order of March 24, 2008, the Court shall apply the rule of reason analysis to this suit. "A restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects." Id. at 1063.

I. Defendants' Joint Motion to Dismiss

All sixteen defendants have joined a single motion to dismiss, which makes two main arguments: (1) Plaintiffs lack standing to allege an antitrust violation because they are indirect purchasers; and (2) Plaintiffs have failed to allege a relevant product market that is cognizable under the antitrust laws.

A. Plaintiffs' Standing under *Illinois Brick*

Defendants contend that Plaintiffs lack standing to bring an antitrust claim for damages² because they are indirect purchasers of foreign ATM transactions routed over the Star network. In Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), the Supreme Court narrowed the class of plaintiffs that have statutory standing to enforce antitrust laws. There, the Supreme Court held that indirect purchasers may not bring an antitrust claim where an overcharge was passed on to the plaintiff through the distribution chain; only direct purchasers have standing to sue. Id. at 728. The Supreme Court reasoned that a direct purchaser rule serves to eliminate the "evidentiary complexities and uncertainties" of

²The direct purchaser rule does not apply to equitable relief, see Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1235 (9th Cir. 1988), which is also sought by Plaintiffs.

1 apportioning overcharges between direct and indirect purchasers. Id. at 731-33, 740-43.
2 “[A]ntitrust laws will be more effectively enforced by concentrating the full recovery for the
3 overcharge in the direct purchasers rather than by allowing every plaintiff potentially
4 affected by the overcharge to sue” Id. at 735.

5 The direct purchaser rule was reaffirmed in Kansas v. UtiliCorp United, Inc., 497 U.S.
6 199 (1990). There, the states of Kansas and Missouri, on behalf of individual energy
7 consumers, initiated suits against a pipeline company and five gas production companies,
8 alleging that the defendants conspired to inflate the price of gas. Id. at 204. The Court
9 determined that the states lacked standing because the consumers they represented were
10 indirect purchasers. Id. at 207. The consumers bought gas directly from the utilities, so “any
11 antitrust claim against the defendants is . . . for the utilities to assert.” Id.

12 Case law has loosely recognized three “exceptions” to the direct purchaser rule: (1) if
13 there was a pre-existing cost-plus contract, see UtiliCorp, 497 U.S. at 217-18; (2) the direct
14 purchaser is owned or controlled by the indirect purchaser, Royal Printing Co. v. Kimberly-
15 Clark Corp., 621 F.2d 323, 326 (9th Cir. 1980); or (3) where there is a price-fixing
16 conspiracy between the manufacturer and the middleman, Arizona v. Shamrock Foods Co.,
17 729 F.2d 1208, 1211 (9th Cir. 1984).

18 1. The Royal Printing “No Reasonable Possibility” Exception

19 In Royal Printing, the Ninth Circuit applied the direct purchaser rule. A printing
20 company and other small businesses brought suit against ten manufacturers of paper
21 products. 621 F.2d at 324. The plaintiffs had never bought paper products directly from any
22 of the defendants, instead purchasing through wholesale firms. Id. The Ninth Circuit
23 permitted the suit to proceed insofar as plaintiffs could demonstrate that the wholesaler was a
24 subsidiary of a defendant. Id. at 326. However, those plaintiffs who bought through
25 independent wholesalers that were not owned or controlled by any defendant were only
26 indirect purchasers. Id. at 327-28. Therefore, the Illinois Brick rule barred them from
27 sustaining a suit.

1 Nonetheless, the Ninth Circuit held that “Illinois Brick does not bar an indirect
2 purchaser’s suit where the direct purchaser is a division or subsidiary of a co-conspirator.”
3 Id. at 326. The court first observed that, in such a case, there was little fear of multiple
4 liability because of the unlikelihood that a subsidiary would sue its parent’s co-conspirators.
5 Id. “Because, . . . as a practical matter the direct purchasers here will never sue, barring
6 [plaintiff’s] suit would close off every avenue for private enforcement of the antitrust laws in
7 such cases. This would be intolerable.” Id. at 327.

8 In this Court’s order on summary judgment, it stated that “[w]ithout deciding the
9 issue, the Court notes that an exception to Illinois Brick would apply if there is no realistic
10 possibility that the Star network’s members – who both pay and receive the interchange fee –
11 would sue the network for antitrust violations.” Order Mar. 24, 2008 (citing Royal Printing,
12 621 F.2d at 326). Plaintiffs pursue that argument here, and the Court agrees: there is no
13 realistic possibility that Defendants would sue to recover cartel overcharges or terminate an
14 interchange fee scheme that allegedly allows them to reap inflated profits through foreign
15 ATM fees.

16 Defendants complain that the language cited in Royal Printing is mere dicta because
17 the plaintiffs in that case had not actually purchased paper from the manufacturer’s
18 subsidiaries or divisions. However, “most courts considering the [similar] question correctly
19 allow the indirect purchaser to recover” in these circumstances. Areeda et al., Antitrust Law,
20 ¶ 346f (3d ed. 2007) (collecting cases).

21 Defendants’ argument that Royal Printing was abrogated by UtiliCorp, 497 U.S. 199,
22 is similarly unavailing. There, the Court held that residential customers were indirect
23 purchasers of gas because the good was distributed through utility companies. Id. at 214. In
24 denying the exception sought by the plaintiffs, the Court noted that utilities themselves have
25 incentives to sue overcharging suppliers. Id. (“Utilities, moreover, have an established
26 record of diligent antitrust enforcement, having brought highly successful [antitrust] actions
27 in many instances.”) Such is not the case here, where Plaintiffs have alleged that Defendants
28 both participate in and profit from the price-fixing.

1 In Freeman v. San Diego Association of Realtors, 322 F.3d 1133, 1145-46 (9th Cir.
2 2003), the Ninth Circuit applied the exception described in Royal Printing. There, the
3 plaintiffs paid a fee set by an entity known as “Sandicor” for access to a real estate listing
4 service. Id. at 1140-41. Plaintiffs sued the real estate associations that owned and controlled
5 Sandicor, alleging the fee was inflated by collusively set “support fees” that Sandicor paid to
6 the real estate associations that owned and controlled it. Id. at 1142. The Freeman court
7 stated:

8 [I]ndirect purchasers can sue for damages if there is no realistic possibility that
9 the direct purchaser will sue its supplier over the antitrust violation. The
10 associations [defendants] own Sandicor [direct purchaser]. They appoint its
board of directors, and they are accused of conspiring with it. There's no
realistic possibility Sandicor will sue them.

11 322 F.3d 1133, 1145-46 (9th Cir. 2003). Because there was “no realistic possibility that the
12 direct purchaser [would] sue its supplier over the antitrust violation,” the Freeman court
13 permitted the indirect purchaser to sustain its claim. Id.

14 Similarly, here there is “no realistic possibility” that the Bank Defendants would sue
15 Star or the co-defendants. Plaintiffs allege that the banks themselves controlled the Star
16 network and colluded to set the interchange fee. The banks created Star and agreed upon its
17 operating rules. In so doing, Plaintiffs allege Defendants conspired to fix interchange fees.
18 SAC ¶ 141. Plaintiffs further allege that Defendants continue to profit from charging inflated
19 foreign ATM fees based on the fixed interchange fee. SAC ¶ 117. Thus, as a practical
20 matter, Plaintiffs are the only parties positioned to allege an antitrust claim.

21 2. The Co-Conspirator Exception

22 Plaintiffs also contend that the Illinois Brick direct purchaser rule does not apply
23 because here, Plaintiffs are the first innocent purchasers in the chain of distribution. See
24 Shamrock Foods, 729 F.2d at 1211. In Shamrock Foods, the plaintiffs alleged that retail
25 grocery stores were co-conspirators with dairy producers to fix the price of dairy products at
26 the retail level. Id. The Ninth Circuit held that Illinois Brick did not apply because the retail
27 price was the one fixed, and the theory of recovery did not depend on pass-on of damages.
28 Id. The plaintiffs were not alleging a conspiracy at the wholesale level, rather they presented

1 a conspiracy among horizontal competitors at the retail level to fix retail prices. Id. “Illinois
2 Brick does not prevent this garden variety price-fixing claim.” Id.

3 In dicta, the Ninth Circuit went on to observe that “[e]ven if the plaintiffs were
4 claiming a two-tier conspiracy, we would hold that Illinois Brick is no bar to the suit.” Id.
5 The court noted the many other opinions that found the direct purchaser rule inapplicable in
6 claims against “remote sellers when the plaintiffs allege that the sellers conspired with
7 intermediates in the distribution chain to fix the price at which the plaintiffs purchased.” Id.
8 at 1212. The court determined that the two main policies at play in Illinois Brick, (1) the risk
9 of duplicative recovery if indirect and direct purchasers could bring suit and (2) the problem
10 of a complex damage computation, were not at issue because the plaintiffs alleged a
11 conspiracy that fixed prices at the retail level. Id. at 1214. “There is no need to apportion
12 that overcharge because it was not passed on to the consumers through any other level in the
13 distribution chain.” Id.

14 Here, Plaintiffs allege that they paid foreign ATM fees to one or more of the Bank
15 Defendants. SAC ¶¶ 7-9, 57-58. Plaintiffs further allege that the banks participating in Star
16 agreed collectively to fix the price of ATM interchange fees, SAC ¶¶ 98-113, and that the
17 banks “mark up” the interchange fees to set their foreign ATM fees which they pay to the
18 Bank Defendants and their co-conspirators. SAC ¶¶ 1, 7-9, 99. Accordingly, the direct
19 purchaser rule is inapplicable because Plaintiffs have alleged that they purchased directly
20 from parties to the unlawful agreement. See Shamrock Foods, 729 F.2d at 1211. Defendants
21 contend that Shamrock Foods is distinguishable, because here the allegedly unlawful
22 agreement set the interchange fee, and not the foreign ATM fees that the Bank Defendants
23 directly charge Plaintiffs. However, Plaintiffs do allege that the artificially high interchange
24 fee is the basis for the inflated foreign ATM fees. By alleging that Plaintiffs are purchasing
25 directly from the price-fixing conspirators, Plaintiffs may sustain a claim for damages under
26 the Sherman Act. The fee paid by the consumers to the Defendants includes the fee that was
27 allegedly unlawfully set by Defendants. Accordingly, the Court also holds that the co-
28 conspirator exception applies to preclude the Illinois Brick bar.

1 3. Recent Ninth Circuit Case Law

2 The Ninth Circuit recently revisited the direct purchaser rule in Kendall v. Visa
 3 U.S.A., Inc., 518 F.3d 1042, 1049-50 (9th Cir. 2008). There, merchants brought an antitrust
 4 action against both credit card companies and banks, alleging that the defendants conspired
 5 to set fees on credit card purchases. Id. at 1044-45. The court found that, because the fee at
 6 issue was set by the credit card companies and not by the banks, the banks were the
 7 “middlemen.” Id. at 1048-49. As a result, plaintiffs could not maintain an antitrust suit
 8 against the credit card companies as direct purchasers because they ran “squarely into the
 9 Illinois Brick wall.” Id. at 1049.

10 At first blush, Kendall appears to offer strong support to Defendants’ position. Yet in
 11 Kendall, the court specifically rejected Plaintiffs’ attempt to rely on the co-conspirator
 12 exception because they failed to allege any facts showing that the banks were either
 13 controlled by or in a conspiracy with the credit card companies. Id. at 1050. The court also
 14 rejected plaintiffs “attempt to rely upon Freeman” because “they failed to allege any facts
 15 establishing that there is no realistic possibility that the Banks will not sue the Consortiums.”
 16 Id.

17 Here, Plaintiffs have alleged with some specificity that the Bank Defendants exerted
 18 actual control over the Star network and the setting of the interchange fee. See SAC ¶¶ 99-
 19 115. For example, Plaintiffs allege that the “Bank Defendants, acting through Star’s Board
 20 of Directors, collectively adopted and enforced Star’s Operating Rules mandating payment of
 21 Interchange Fees.” SAC ¶ 100. Moreover, “Star and its Board of Directors conspired to fix,
 22 through a concert of action, Star’s Interchange Fees. Pursuant to this illegal agreement, each
 23 member bank agreed to pay the fixed Interchange fees.” SAC ¶ 101. “At all relevant times,
 24 the Defendants continued to participate in the conspiracy and reap the benefits of
 25 supracompetitive Interchange Fees. At no time did any of the Defendants take the steps
 26 necessary to withdraw publicly from the conspiracy or otherwise abandon it.” SAC ¶ 112.
 27 Finally, Plaintiffs specifically allege:

1 There is no realistic possibility that any member Bank that both issues ATM
2 cards and owns ATMs, which is the vast majority of members including all
3 Bank Defendants, would sue Star over fixed Interchange Fees, because they
4 both pay and receive Interchange Fees. The Bank Defendants also mark-up the
Interchange Fees to compute Foreign ATM Fees, which are a significant source
of their revenue. Accordingly they benefit from fixed Interchange Fees. They
are also co-conspirators.

5 SAC ¶ 141.

6 In Delaware Valley Surgical Supply Inc. v. Johnson & Johnson, 523 F.3d 1116, 1122
7 (9th Cir. 2008), the Ninth Circuit applied the direct purchaser rule to bar a suit brought by a
8 hospital against a medical supplies manufacturer. In a straightforward application of the
9 Illinois Brick rule, the court held that the hospital lacked standing because it purchased its
10 supplies from an independent third-party distributor. Id. In so doing, the court rejected the
11 plaintiff's attempt to craft a new formulation of the direct purchaser rule in circumstances
12 where the indirect purchaser was itself involved in contractual negotiations with the
13 manufacturer that had an impact on the final retail price. Id. at 1122-23. The court was not
14 persuaded. Id. at 1123. Despite those negotiations, the plaintiff had purchased its supplies
15 entirely from an independent distributor who was itself positioned to allege an antitrust
16 claim. Id. In declining to recognize a new exception to Illinois Brick, the Delaware Valley
17 court recognized the existing exceptions and did not purport to abrogate their application. Id.
18 at 1123 n.1.

19 In sum, Plaintiffs' claim withstands the Illinois Brick direct purchaser rule. Plaintiffs
20 have properly alleged that they are involved in direct transactions with Defendants which are
21 inflated by Defendants' unlawful price-fixing conspiracy. Furthermore, Plaintiffs are
22 afforded standing to vindicate the antitrust laws because there is no realistic possibility that
23 the Bank Defendants would bring a similar suit against the Star network or their co-
24 defendants.

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1 B. Plaintiffs Have Not Pled a Legally Cognizable Market

2 Although the Court holds that Plaintiffs have standing to assert an antitrust violation,
 3 it is not persuaded that their claim can persist as currently pled. The SAC alleges that the
 4 relevant product market is “the provision of Foreign ATM Transactions routed over Star.”
 5 SAC ¶ 119. Plaintiffs further allege that the “relevant product market is wholly derivative
 6 from and dependent on the market for deposit accounts.” SAC ¶ 121.

7 Under rule of reason analysis, “the plaintiff bears the initial burden of showing that
 8 the restraint produces significant anticompetitive effects within a relevant market.” Tanaka
 9 v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001). “The term ‘relevant market’
 10 encompasses notions of geography as well as product use, quality, and description. The
 11 geographic market extends to the area of effective competition where buyers can turn for
 12 alternate sources of supply.” Oltz v. St. Peter’s Cmty. Hosp., 861 F.2d 1440, 1446 (9th Cir.
 13 1988) (internal citation and quotations omitted).

14 “There is no requirement that [the market definition] elements of the antitrust claim be
 15 pled with specificity.” Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th
 16 Cir. 2008). “An antitrust complaint therefore survives a Rule 12(b)(6) motion unless it is
 17 apparent from the face of the complaint that the alleged market suffers a fatal legal defect.”
 18 Id. The existence of a “relevant market” is typically a factual inquiry for the jury. Id.
 19 However, a complaint may be dismissed if the market definition is “facially unsustainable.”
 20 Id.; see, e.g., Tanaka, 252 F.3d at 1063 (affirming dismissal where plaintiffs failed to identify
 21 an appropriate product market); Big Bear Lodging Ass’n v. Snow Summit, Inc., 182 F.3d
 22 1096, 1104 (9th Cir. 1999) (affirming dismissal of monopolization claim where plaintiffs did
 23 not “sufficiently identify the markets affected by Defendants’ alleged antitrust violations”);
 24 Apple, Inc. v. Psystar Corp., 586 F. Supp. 2d 1190, 1203 (N.D. Cal. 2008) (dismissing claim
 25 because plaintiff’s assertion of a relevant market “contravenes the pertinent legal standards”).

26 “For antitrust purposes, a ‘market is composed of products that have reasonable
 27 interchangeability for the purposes for which they are produced – price, use and qualities
 28 considered.’” Paladin Assoc., Inc. v. Montana Power Co., 328 F.3d 1145, 1163 (9th Cir.

1 2003) (citation omitted). “[T]he relevant market must include the group or groups of sellers
2 or producers who have actual or potential ability to deprive each other of significant levels of
3 business.” Newcal, 513 F.3d at 1045 (citation omitted). Plaintiffs must plead facts showing
4 that their product market “bear[s] a rational relation to the methodology courts prescribe to
5 define a market for antitrust purposes – analysis of the interchangeability of use or the cross-
6 elasticity of demand, and it must be plausible.” Chapman v. New York State Div. for Youth,
7 546 F.3d 230, 237 (2d Cir. 2008) (citation omitted). The fact that multiple products may do
8 the same thing does not mean they are “reasonably interchangeable” to the consumer. See
9 U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 995-96 (11th Cir. 1993) (recognizing
10 relevant market was more narrow where multiple factors showed inelastic demand for
11 anchors). An essential consideration is whether there is cross-elasticity of demand for the
12 similar products. See FTC v. Swedish Match, 131 F. Supp. 2d 151, 158-59 (D.D.C. 2000)
13 (“Finding two products to be functionally interchangeable, however, does not end the
14 analysis.”)

15 1. Plaintiffs’ Derivative Aftermarket Is Insufficiently Pled

16 In the two previous complaints, Plaintiffs defined the relevant market as the
17 “provision of ATM network services to consumers.” See, e.g., AC ¶ 71. In the current
18 complaint, Plaintiffs have modified the market definition, now alleging a market of “the
19 provision of Foreign ATM Transactions routed over Star” that is “wholly derivative from and
20 dependent on the market for deposit accounts.” SAC ¶¶ 119, 121. The parties dispute
21 whether Plaintiffs may rely on a derivative aftermarket comprised of a single brand of a
22 product – a market consisting only of transactions routed over Star, but excluding other ATM
23 networks.

24 “[T]he law permits an antitrust claimant to restrict the relevant market to a single
25 brand of the product at issue.” Newcal, 513 F.3d at 1048 (citing Eastman Kodak Co. v.
26 Image Technical Svrs., Inc., 504 U.S. 451 (1992)). However, “[s]ingle brand markets are, at
27 a minimum, extremely rare.” Psystar, 586 F. Supp. 2d at 1198. “[C]ourts have usually

1 rejected the claim that one brand is its own market when there are competing brands.” Glen
 2 Holly Entm’t, Inc. v. Tektronix, Inc., 100 F. Supp. 2d 1073, 1078 n.6 (C.D. Cal. 1999).

3 In Kodak, the case that gave rise to a potential single brand market claim, the
 4 plaintiffs were a group of independent service organizations that worked on photocopiers
 5 manufactured by Kodak. Kodak, 504 U.S. at 455. The plaintiffs alleged that Kodak exerted
 6 monopoly power over the market for Kodak-compatible parts. Id. Kodak adopted policies
 7 that limited the availability of its parts, which made it more difficult for the plaintiffs to
 8 compete with Kodak in servicing Kodak equipment. Id. The Court explained that in certain
 9 circumstances, a single brand of a product can constitute a separate market. Id. at 482.
 10 “Because service and parts for Kodak equipment are not interchangeable with other
 11 manufacturers’ service and parts, the relevant market from the Kodak equipment owner’s
 12 perspective is composed of only those companies that service Kodak machines.” Id. The
 13 Court labeled this as a single-brand “derivative aftermarket.” Id. at 455. The single-brand
 14 aftermarket for parts and service for Kodak equipment arose once customers had purchased
 15 and were “locked in” to Kodak equipment. Id. at 476.

16 Recently in Newcal, the Ninth Circuit held that plaintiffs could state a claim where
 17 they alleged the “relevant market” was for parts and service for IKON photocopiers for
 18 customers who had service contracts with IKON. 513 F.3d at 1045-50. This was similar to
 19 the situation addressed in Kodak: a single brand derivative aftermarket for products that was
 20 related to or dependent on a specific company’s products. The Newcal plaintiffs plead:

21 the existence of two separate but related markets in intraband copier equipment
 22 and service. The first market [was] an initial market for copier leases and
 23 copier service, which (as the district court correctly found) is a competitive
 24 market in which IKON has no significant market power. The second market
 25 [was] a derivative aftermarket for replacement equipment, which include[d]
 markets for lease “buy outs” and for “lease-end services.” As in all three of the
 cited cases, the relevant market here [was] not the indisputably competitive
 market in which the consumers first shop for the primary product. It [was] an
 aftermarket in which the consumers claim that they should be able to shop for a
 secondary product.

26 Id. at 1049.

27 The court analogized the market definition in Newcal to the market sustained in
 28 Kodak, where the manufacturer “held a natural monopoly in the submarket . . . which gave it

1 a unique position in the wholly derivative aftermarket for service contracts.” Id. In both
2 cases, the defendant was “exploiting its unique position – its unique contractual relationship
3 – to gain monopoly power in a derivative aftermarket in which its power is not contractually
4 mandated.” Id. at 1050.

5 Two courts in this district have also recently addressed the relevant market inquiry.
6 See In re Apple & AT&T Antitrust Litigation, 596 F. Supp. 2d 1288 (N.D. Cal. 2008);
7 Apple, Inc. v. Psystar Corp., 586 F. Supp. 2d 1190 (N.D. Cal. 2008). In re Apple involved an
8 arrangement between Apple and AT&T, whereby consumers of iPhones were required to
9 sign a two-year service agreement with AT&T Mobility. Id. at 1294. Unbeknownst to
10 customers, the companies also had agreed to restrict service for an additional period after the
11 expiration of the initial contract. Id. The plaintiffs alleged the relevant market was the
12 aftermarket for iPhone voice and data services. Id. at 1303. Citing to Newcal, the district
13 court sustained the complaint, finding that the plaintiffs had sufficiently “alleged an
14 aftermarket for iPhone services that would not exist without the primary market for iPhones,
15 and is those wholly derivative from and dependant on the primary market.” Id. By buying
16 an iPhone and contracting for service, “Defendants involuntarily impose on consumers a
17 contract exclusivity restriction which restricts their freedom from that point forward for at
18 least the next five years and conceivably for the life of the iPhone.” Id. at 1304. The court
19 noted that the consumers “own the iPhone,” and that they were tied by financial
20 commitments to the phone service. Id.

21 In Apple, Inc. v. Psystar Corp., the court dismissed Psystar’s claim for failure to allege
22 a relevant market. 586 F. Supp. 2d at 1203. Psystar filed a counterclaim against Apple under
23 the Sherman Act. Id. at 1192. Psystar alleged two relevant markets, one being the single
24 brand derivative aftermarket for computers that could run the Mac OS operating system. Id.
25 at 1193. Psystar alleged that Apple sought to dominate the aftermarket for Mac OS-
26 compatible computer hardware systems through its exclusionary behavior. Id. at 1200. In a
27 thorough opinion, Judge Alsup distinguished both Kodak and Newcal. Id. at 1200-01. The
28 court noted that in Kodak, customers “did not knowingly bind themselves to a single brand

1 of the aftermarket and market imperfections (information costs and switching costs)
 2 prohibited customers from imposing market discipline in the aftermarket by switching among
 3 competitors in the primary market.” Id. at 1201. Apple, on the other hand, “ask[ed] its
 4 customers to purchase Mac OS knowing that it is to be used only with Apple computers.” Id.
 5 The court found Newcal was inapplicable because Newcal disavowed the very type of claim
 6 asserted by Apple, holding that a claimant may not rely on market power “that arises solely
 7 from contractual rights that customers knowingly and voluntarily gave to the defendant.” Id.
 8 (quoting Newcal, 513 F.3d at 1048). Purchasers of the Mac OS did so knowing that it could
 9 only be used with Apple computers. Id. Judge Alsup also distinguished In re Apple because
 10 the plaintiff had not alleged any undisclosed exclusivity agreement – the aftermarket
 11 restriction was fully disclosed. Id. at 1202.

12 The Court finds Plaintiffs have failed to plead a legally sufficient relevant market.
 13 Plaintiffs correctly point out that, in general, whether a relevant market exists as alleged is a
 14 question of fact. Courts may, however, grant dismissal when the alleged relevant market
 15 “contravenes the pertinent legal standards.” See id. at 1203. “[C]ourts have been extremely
 16 reluctant to embrace” Kodak’s single-brand market theory, “much less to extend it to other
 17 types of goods.” Streamcast Networks, Inc. v. Skype Tech., S.A., 547 F. Supp. 2d 1086,
 18 1094-95 (citing Kintner, 2-10 Federal Antitrust Law § 10.8).

19 The prior single brand derivative aftermarket cases have focused on the provision of
 20 expensive, durable goods. Once a consumer buys such a good, like a photocopier, he is
 21 “locked in” to purchasing compatible parts and service for a considerable length of time,
 22 given the expense and difficulty of buying a new photocopier. In those circumstances,
 23 market imperfections prevent customers from imposing market discipline in the derivative
 24 market because of the difficulty of switching among competitors in the primary market. See
 25 Psystar, 586 F. Supp. 2d at 1201.

26 It is unclear to the Court that a holder of a bank account, on the other hand, faces such
 27 hurdles in simply moving his business elsewhere. Plaintiffs’ “relevant market” is a
 28 derivative aftermarket of the “primary market for deposit accounts.” SAC ¶ 121. Plaintiffs

1 argue that once customers open accounts with Star member banks, they become “locked-in”
2 to the Star network. Thus, Plaintiffs contend they have no choice among ATM networks at
3 the time of each foreign ATM transaction. Where Plaintiffs fall short, however, is in their
4 failure to plead a viable theory suggesting that once a customer signs up for a bank account,
5 he is “locked in” to that bank’s services. There are numerous banks that offer deposit
6 accounts and ATM services, and customers may presumably switch to a new bank if they are
7 unhappy with the services offered by their current institution. Because Plaintiffs have failed
8 to allege that they are effectively limited to the Star network as a result of their present
9 banking relationships, they have failed to plead that they are “locked in” to the derivative
10 aftermarket. When this issue was discussed at the hearing, Plaintiffs represented that there
11 are significant hurdles to switching banks that are not obvious to the Court. Accordingly, the
12 Court hereby GRANTS Defendants’ motion to dismiss, but Plaintiffs are granted leave to
13 amend the complaint so as to allege an adequate relevant market. As the validity of the
14 relevant market is typically a factual element, an adequately pled relevant market can then be
15 factually tested through summary judgment or trial. See Newcal, 513 F.3d at 1045.

16 2. Whether a Separate Market Exists

17 Defendants argue that Plaintiffs’ “relevant market” theory is further flawed because it
18 is not clear that the provision of ATM services is separate from the provision of general
19 banking services. An aftermarket exists when a customer buys two separate products. See
20 Kentmaster Mfg. Co. v. Jarvis Prods. Corp., 146 F.3d 691, 695 (9th Cir. 1998). There is
21 presumably no aftermarket if the customers “purchase the alleged primary- and aftermarket-
22 products at the same time, as a package.” Psystar, 586 F. Supp. 2d at 1201.

23 Defendants contend that there is no aftermarket here because, as stated in the
24 complaint, “consumers cannot obtain ATM Cards without first opening deposit accounts.”
25 See SAC ¶ 121. Thus, ATM services are part of the “package” of services consumers
26 acquire when they open a deposit account. On the other hand, Newcal, Kodak, and In re
27 Apple involved clearly distinct products in the primary and aftermarket: the initial good and
28

1 then the derivative goods and services necessary to maintain the initial good. A different
2 transaction was involved in procuring each.

3 Defendants' argument on this issue will not be the basis for granting the motion to
4 dismiss. Although the bank issues an ATM card at the time the account is opened, a
5 consumer is arguably involved in a separate transaction each time he visits a foreign ATM
6 for a withdrawal. See SAC ¶¶ 122-24. On the current record, the Court is not persuaded that
7 Plaintiffs' relevant market insufficiently alleges a separate and distinct product. As this case
8 proceeds, Defendants may attempt to prove otherwise, but it would be premature to dismiss
9 on this ground.

10 3. Whether ATM Networks are "Reasonably Interchangeable"

11 Defendants further contend that Plaintiffs' complaint must fail because ATM
12 networks are "reasonably interchangeable" with each other. Whether there are functionally
13 similar products is not the end of the inquiry, however; the Court must also look to whether
14 there is cross elasticity of demand. See FTC v. Swedish Match, 131 F. Supp. 2d 151, 158-59
15 (D.D.C. 2000). Here, Plaintiffs specifically allege that "ATM Networks other than Star are
16 not substitutes for Foreign ATM Transactions routed over Star. When withdrawing cash at
17 Foreign ATMs, consumers have no choice regarding the ATM Networks over which the
18 transactions are routed." SAC ¶ 125. Plaintiffs concede that Star is one of many ATM
19 networks, see SAC ¶ 75, but they also allege that a consumer is not presented with any
20 alternative options because his bank account locks him into the Star network, SAC ¶ 125. As
21 discussed above, the Court takes issue with the premise of this allegation – that the consumer
22 has no options because he is "locked into" his bank account – and dismisses with leave to
23 amend on that ground. Yet, if the Plaintiffs get past that hurdle, they have satisfied the
24 requirement of pleading that there is not a "reasonably interchangeable" option available to
25 consumers. "The cross-elasticity of demand analysis depends on information about
26 consumer behavior and perceptions and is accordingly a deeply fact intensive inquiry." In re
27 Payment Card Interchange Fee and Merchant Discount Antitrust Litig., 562 F. Supp. 2d 392,
28

1 399 (E.D.N.Y. 2008). It is too early to say whether Plaintiffs can meet their burden in this
2 regard.

3

4 II. SunTrust Bank's Motion to Dismiss

5 SunTrust's motion, which is joined by all Defendants, argues in essence that Plaintiffs
6 fail to state an antitrust offense at all. The motion is based on four propositions:

- 7 1. ATM networks require the process of interchange conducted pursuant to
contract or rules.
- 8 2. Bilateral negotiations are not feasible in a network such as Star; the
interchange process thus required network-level interchange rules,
including a "price rule."
- 9 3. If interchange requires a network fee rule, then having such a rule by
definition does not eliminate competition over fees that otherwise would
exist.
- 10 4. Since interchange fees cannot be set through competition, Plaintiffs'
claim can only be about preferring one network-level fee over another –
a claim that lies outside the domain of antitrust.

11 See SunTrust's Reply.

12 The Court declines to subscribe to this argument because it does not agree with its
13 premise: it is not altogether clear that a set network-level interchange fee is necessary to the
14 operation of the Star network. In the recent order on summary judgment, the Court held only
15 that fixing of the interchange fee did not per se violate the Sherman Act. The Court noted
16 that there must be some rules to govern the apportionment of costs in a payment system such
17 as the Star network. In re ATM Fee Antitrust Litig., 554 F. Supp. 2d 1003, 1016 (N.D. Cal.
18 2008). The Court held that the apportionment of costs is a legitimate purpose, ancillary to
19 the operation of the Star network, and that such apportionment may be fixed in some manner.
20 Id. Defendants succeeded in avoiding application of per se analysis because they showed
21 that the fee has procompetitive justifications. Id.

22 The Court's order should not be read to say that the interchange fee set by the network
23 is necessarily permissible under the rule of reason analysis. The Court's holding was simply
24 that, because there are procompetitive reasons in favor of setting an interchange fee, per se
25 analysis is inapplicable. See id. Yet by opining that it is perhaps necessary to apportion
26

1 costs among members of an ATM network, the Court did not consider the interchange fee
2 itself under the rule of reason analysis. Aside from any purported procompetitive
3 justifications, Plaintiffs' claim under the rule of reason asserts that the fixed interchange
4 serves to inflate prices charged to consumers. Thus, Plaintiffs assert that the rate's
5 anticompetitive effects outweigh the procompetitive justifications identified by the Court.
6 An inquiry into whether the evidence supports Plaintiffs' claim has yet to be conducted. In
7 the prior motion, the parties and the Court all agreed that the only issue before the Court was
8 whether per se analysis should apply. Accordingly, the Court will not read its prior order to
9 have made a factual determination that forecloses Plaintiffs' rule of reason claim.

10

11 III. Bank of America's Motion to Dismiss

12 A. Rule 15 "Relation Back" Doctrine

13 Plaintiffs' previous complaints named the Bank of America Corporation ("BAC") as a
14 defendant. The current complaint still names BAC, but Plaintiffs have added Bank of
15 America, N.A. ("BANA") as a defendant. BAC is a bank holding company, not a bank. The
16 entity that participates in the Star network is BANA, a subsidiary of BAC. BANA, the newly
17 named defendant, moves to dismiss on the ground that the statute of limitations bars
18 Plaintiffs' suit against it.

19 The statute of limitations for claims under the Sherman Act is four years. 15 U.S.C. §
20 15(b). Plaintiffs' SAC was filed on February 2, 2009, so BANA contends it is untimely with
21 respect to all claims arising before February 2, 2005. Plaintiffs contend that the "relation
22 back" doctrine of Federal Rule of Civil Procedure 15 should apply. Under Rule 15, a new
23 defendant may be made party to an existing complaint if (1) the claim arose out of the same
24 conduct, transaction, or occurrence; (2) the new defendants received sufficient notice of the
25 original action within 120 days so as not to be prejudiced in defending on the merits; and (3)
26 the new defendants knew or should have known that "but for a mistake concerning the proper
27 party's identity" the complaint would have included them. Fed. R. Civ. P. 15(c)(1)(C); Percy
28 v. San Francisco Gen. Hosp., 841 F.2d 975, 978 (9th Cir. 1988). The main objective is

1 avoiding prejudice to the party to be added. Id. Plaintiffs argue that as BANA was certainly
2 on notice of this suit and shares counsel with BAC, it would not suffer prejudice if forced to
3 defend.

4 The parties do not dispute that the first and second prongs of Rule 15(c) are met, but
5 BANA presents persuasive reasons as to why Plaintiffs have not satisfied the “mistake”
6 prong. “The mistake under Rule 15(c) has to be as to identity.” Louisiana-Pacific Corp. v.
7 ASARCO, Inc., 5 F.3d 431, 434 (9th Cir. 1993). If this Defendant were omitted because
8 they were unknown to the plaintiff at the time the complaint was filed, then amendment may
9 be proper. See Kilkenny v. Arco Marine Inc., 800 F.2d 853, 856-58 (9th Cir. 1986).
10 “However, if a plaintiff is aware of the potential defendant’s identity at the time the original
11 complaint is filed, but is uncertain whether the potential defendant may be found liable,
12 amendment is not allowed to defeat the statute of limitations.” In re Brocade Commc’n Sys., Inc. Derivative Litig., 615 F. Supp. 2d 1018, 1041 (N.D. Cal. 2009). “Similarly, if the
13 plaintiff learns of the defendant within the limitations period, but seeks to add the defendant
14 only after the period has expired, amendment is not allowed.” Id. “In these two situations,
15 the plaintiff’s failure to add the defendant(s) before the expiration of the statute of limitations
16 cannot be characterized as a ‘mistake concerning . . . identity’ because the plaintiff was
17 aware of the new party’s identity before the statute of limitations had run.” Brink v. First
18 Credit Res., 57 F. Supp. 2d 848, 856 (D. Ariz. 1999). “The defendant deserves the protection
19 of the statute of limitations because he or she may believe the plaintiff made a conscious
20 decision not to include him or her.” Id.; see also Kilkenny, 800 F.2d at 857-58 (“Rule 15(c)
21 was never intended to assist a plaintiff who ignores or fails to respond in a reasonable fashion
22 to notice of a potential party”).

23 Plaintiffs cannot defeat the statute of limitations by arguing that relation back applies
24 because Plaintiffs were on notice of BANA’s participation with the Star network for over
25 three years before naming it as a party. The original complaint was filed on July 2, 2004, and
26 the amended complaint was filed on May 25, 2005. Plaintiffs correctly identified and named
27 the banking entities of Wachovia, Wells Fargo, and Bank One, but failed to identify the

1 correct Bank of America entity. In its July 5, 2005 initial disclosures, BAC informed
 2 Plaintiffs that BANA was the corporate entity likely to have information pertaining to this
 3 suit. See Smith Decl. Ex. 10 at 4-7. To follow-up, BAC's counsel called Plaintiffs' counsel
 4 to explain that BANA, and not BAC, is a member of the Star network. See id. at 8. BAC
 5 explicitly suggested that Plaintiffs may wish to amend the pleadings to name BANA. See id.
 6 Ex. 9 at 2. On August 5, 2005, BAC sent Plaintiffs a letter reiterating that "the complaint in
 7 this case names as a defendant in this case [BAC] rather than [BANA], which is the
 8 corporate entity that runs the retail bank and participates in the Star ATM network." See id.
 9 Ex. 10 at 8. The letter further stated that "it does not appear that [BAC] is the entity that
 10 Plaintiffs truly intended to sue in this case." Id.

11 In response, Plaintiffs sent an email stating:

12 We appreciate your willingness to cooperate with regard to making BANA a
 13 party, and to respond to any discovery served on BANA within 15 days. But
 14 we are very concerned about whether BANA can be added promptly and
 15 without complications, even if you cooperate and the other defendants don't
 interfere. We have not yet decided how we are going to proceed in that regard,
 but our overriding goal will continue to be getting discovery from BANA as
 soon as possible.

16 Id. at 10.

17 On September 15, 2005, BAC again reiterated that Plaintiffs should be demanding
 18 discovery from BANA rather than BAC. BAC noted that it was "willing to cooperate if you
 19 should decide to . . . move to amend the complaint to add BANA as a defendant." Id. Ex. 8
 20 at 9. Plaintiffs did not add BANA, and the parties litigated a discovery dispute regarding
 21 whether BAC had sufficient "control" over BANA's documents to require it to obtain those
 22 documents from its subsidiary. Plaintiffs won that fight. See In re ATM Fee Antitrust Litig.,
 23 233 F.R.D. 542 (N.D. Cal. 2005). BAC complied with the Court's order, but continued to
 24 take the position that BANA was the entity that could most appropriately defend the suit.
 25 See, e.g., id. Ex. 1 at 2 n.1; Ex. 2 at 2 n.1. Plaintiffs, on the other hand, made it clear that
 26 they "did not name BAC as a defendant by virtue of any 'error' or 'mistake.'" Id. Ex. 6 at 1.
 27 In a discovery order, even Judge Walker stated that he was "somewhat puzzled" as to why
 28 BANA is "not a party in this case." Id. Ex. 7 at 2.

1 In a letter dated November 6, 2005, BAC again noted:

2 Plaintiffs have made clear that their decision not to name BANA as a party was
3 not a ‘mistake’ but rather a deliberate choice. We accept that plaintiffs are
4 entitled to decide whom they wish to sue, and that they have chosen not to sue
BANA in this action.

5 Id. Ex. 9 at 5 n.5 (citation omitted). Litigation proceeded over the next three years with
6 various discovery and motions practice. On February 2, 2009, Plaintiffs filed the SAC,
7 which names BANA as a defendant for the first time.

8 Given this history, Plaintiffs cannot now claim that their failure to add BANA at an
9 earlier time was a “mistake” within the context of Rule 15. Plaintiffs claim that BANA will
10 suffer no prejudice because BANA knew about the litigation and probably expected to be
11 sued. Yet even where a defendant “will not suffer significant prejudice,” Rule 15 applies if a
12 plaintiff fails to add the defendant in a timely fashion. See In re Brocade, 615 F. Supp. 2d at
13 1041. Plaintiffs have failed to demonstrate either that they did not know of BANA’s
14 existence when it filed its first two complaints or that it did not learn of BANA’s potential
15 participation in the suit shortly thereafter. This is simply not a case of mistaken identity. See
16 id.; Louisiana-Pacific Corp., 5 F.3d at 434 (holding Rule 15 did not apply were the plaintiffs
17 “knew who those parties were and made a mistake in who it ought to sue under the
circumstances”).

18 Plaintiffs suggest that the “unusual procedural history” of this case should weigh in
19 favor of their amendment. Throughout 2005, the parties were dealing with discovery
20 motions and Defendants’ first motion for partial summary judgment. On the day set for
21 hearing that motion, Judge Walker recused himself. The case was reassigned to Judge
22 Armstrong, who recused herself in February 2006. In November 2006, this Court terminated
23 the first summary judgment and directed the parties to focus on whether to apply the per se or
24 rule of reason analysis. The second summary judgment motion was filed in August 2007 and
25 decided in March 2008. The Ninth Circuit declined to hear the interlocutory appeal in
26 August 2008, and Plaintiffs filed the SAC in February 2009. Through all this, however, the
27 Court is not persuaded that Plaintiffs could not, within a reasonable time, have added BANA
28 as a named party. They were plainly aware that BANA was an appropriate defendant, yet

1 took no action toward including BANA in the suit. BAC represented that it would not
 2 oppose such an amendment, and in fact actively encouraged Plaintiffs to add BANA. In light
 3 of the overwhelming evidence³ suggesting that Plaintiffs knew that BANA was a proper
 4 party to defend as early as May 25, 2005, they cannot justify applying the relation back
 5 doctrine where they failed to add BANA until February 2009. Accordingly, BANA can only
 6 be held liable for a claim arising within four years of the filing of the SAC.

7 B. Allegations of Agreement

8 The Bank of America Defendants also move to dismiss on the ground that the SAC
 9 fails to allege adequate facts showing that they participated in an unlawful agreement to fix
 10 the interchange fee. The other Bank Defendants have joined in this portion of Bank of
 11 America's motion.

12 1. The SAC Fails to Distinguish Between the Banks and Holding Entities

13 Defendants rightly point out that Plaintiffs' pleading does not distinguish between
 14 operating banks and their holding companies. Rather, Plaintiffs merely lump together
 15 allegations against the holding company and its subsidiary. For example, BAC and BANA
 16 are collectively referred to as "Bank of America." Judge Walker rejected this exact kind of
 17 consolidation of parties when he ruled on the initial motions to dismiss. See Brennan v.
 18 Concord EFS, Inc., 369 F. Supp. 2d 1127, 1136-37 (N.D. Cal. 2005) (holding that Plaintiffs'
 19 allegation was conclusory and insufficient to state a claim where it stated that "Bank One
 20 [Corp] exercised such dominion and control over Bank One, NA and Bank One Arizona that
 21 it is liable according to the law for the acts of Bank One, NA and Bank One Arizona").
 22 There are no allegations in the complaint that tie the holding companies to the alleged
 23 conspiracy to set the interchange fee. Accordingly, dismissal of the SAC is GRANTED as to

25 ³Plaintiffs argue that the Court should not consider the Smith Declaration filed with BANA's
 26 motion because it constitutes extrinsic evidence. Extrinsic evidence cannot be considered on a Rule
 27 12(b)(6) motion to dismiss. Fed. R. Civ. P. 12(d). However, Defendants' motion is also a challenge
 28 to the amendment under Rule 15. At a case management conference on December 5, 2008, the Court
 stated it would allow Plaintiffs leave to amend without requiring them to file a motion. However, the
 Court also stated that Defendants would be entitled to raise any arguments in their challenge to the new
 complaint that could have been raised in opposing the amendment under Rule 15. Accordingly, the
 Court may consider the extrinsic evidence in regard to the challenge to the amendment.

1 the corporate parent Defendants: Bank of America Corporation, JPMorgan Chase & Co.,
2 CitiGroup, Inc., and Wells Fargo & Co. As this very defect was identified by Judge Walker
3 in 2005, and Plaintiffs failed to remedy this problem upon amendment, dismissal is with
4 prejudice.

5 2. The SAC Adequately Pleads Agreement

6 Much attention has been paid to the pleading standards for Sherman Act claims, given
7 the Supreme Court's recent decision in Bell Atlantic Corp. v. Twombly, 550 U.S. 544
8 (2007). There, the Court clarified that:

9 [A] plaintiff's obligation to provide the "grounds" of his "entitle[ment] to
10 relief" requires more than labels and conclusions, and a formulaic recitation of
11 the elements of a cause of action will not do. Factual allegations must be
12 enough to raise a right to relief above the speculative level. . . . In applying
13 these general standards to a § 1 claim, we hold that stating such a claim
14 requires a complaint with enough factual matter (taken as true) to suggest an
15 agreement was made. Asking for plausible grounds to infer an agreement does
16 not impose a probability requirement at the pleading stage; it simply calls for
17 enough fact[s] to raise a reasonable expectation that discovery will reveal
18 evidence of illegal agreement.

19 Id. at 555-56 (internal citations omitted). In Ashcroft v. Iqbal, the Court explained that
20 courts must consider whether a complaint's factual allegations as to each defendant
21 "plausibly suggest an entitlement to relief." 129 S. Ct. 1937, 1951 (2009).

22 Despite Defendants' arguments to the contrary, Plaintiffs' allegations of an unlawful
23 agreement have met the standard set forth in Twombly. Twombly itself was a case where the
24 plaintiffs' theory of an unlawful agreement stemmed from parallel conduct. There, the
25 plaintiffs alleged that defendant telephone companies had "entered into a contract,
26 combination or conspiracy to prevent competitive entry in their respective local telephone
27 and/or high speed internet services markets and have agreed not to compete with one another
28 and otherwise allocated customers and markets to one another." Twombly, 500 U.S. at 551.
The plaintiffs had not made any specific allegations providing direct evidence of an illicit
agreement. Rather, the plaintiffs relied on circumstantial evidence of parallel action. The
Supreme Court found those allegations stated only ultimate facts, and failed to plead the
necessary evidentiary facts to support those conclusions. Id. at 570.

1 In contrast, here Plaintiffs have made more specific allegations of a definite
2 agreement. Plaintiffs allege that “Bank Defendants, acting through Star’s Board of Directors,
3 collectively adopted and enforced Star’s Operating Rules mandating payment of Interchange
4 Fees.” SAC ¶ 100. Plaintiffs contend that the Bank Defendants acted through Star’s Board
5 of Directors on specific occasions with the aim of setting Star’s Interchange Fee. SAC ¶¶
6 100-07. Plaintiffs further allege that each Bank Defendant agreed to abide by Star’s fixed
7 interchange, with the expectation that other Bank Defendants would do so as well. SAC ¶¶
8 110-11. Unlike the circumstantial evidence at play in Twombly, Plaintiffs have made
9 definite allegations about Defendants’ role in making a specific agreement. Whether or not
10 Plaintiffs will be able to prevail on their theory, they have presented a claim that is plausible
11 on its face.

12 Plaintiffs allegations are also more specific than those in the other case relied upon by
13 Defendants, Kendall v. Visa U.S.A., Inc., 518 F.3d 1042 (9th Cir. 2008). In Kendall, the
14 plaintiffs alleged that bank defendants conspired to fix a credit card fee by “merely charging,
15 adopting or following the fees set by a Consortium.” Id. at 1048. The Ninth Circuit found
16 that allegation was “insufficient as a matter of law to constitute a violation of Section 1 of the
17 Sherman Act.” Id. The court noted that “membership in an association does not render an
18 association’s members automatically liable for antitrust violations committed by the
19 association. Even participation on the association’s board of directors is not enough.” Id.
20 (internal citation omitted).

21 Again, here, Plaintiffs have alleged more than parallel conduct or membership in an
22 association as the basis for their claim. Plaintiffs specifically allege that the Defendants who
23 participated in the Star network struck an agreement to set the interchange fee. Plaintiffs
24 detail certain meetings where decisions were made on fees. Defendants are certainly on
25 notice of Plaintiffs’ claims as to how they were involved with the alleged unlawful scheme.
26 As the Supreme Court noted in Twombly, “we do not require heightened fact pleading of
27 specifics, but only enough facts to state a claim to relief that is plausible on its face.” 550
28

1 U.S. at 570. Plaintiffs' allegations provide the Court with a plausible basis for sustaining the
2 SAC.

3

4 **IV. Citigroup, Inc.'s Motion to Dismiss**

5 Citigroup, Inc. is a parent company to Citibank, N.A. and Citibank (West), FSB. The
6 SAC lumps all three entities together, defining them collectively as "Citibank." SAC ¶ 29.
7 As described above, this tactic has been expressly rejected by Judge Walker in this case. The
8 SAC makes no allegations that are specific to the holding entity, Citigroup, Inc.

9 Accordingly, Citigroup's motion to dismiss is GRANTED with prejudice.

10

11

CONCLUSION

12

Based on the foregoing, the Court hereby:

13

(1) DENIES the joint motion to dismiss insofar as it alleges Plaintiffs lack standing to

14 assert a claim for damages under the Sherman Act;

15

(2) GRANTS the joint motion to dismiss with leave to amend because Plaintiffs fail to

16 identify a proper relevant market;

17

(3) DENIES SunTrust's motion to dismiss;

18

(4) GRANTS Bank of America N.A.'s motion to dismiss insofar as Plaintiffs' claim is
19 barred by the statute of limitations; and

20

(5) GRANTS dismissal of the bank holding entities with prejudice.

21

22

IT IS SO ORDERED.

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24

Dated: September 4, 2009



CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

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United States District Court
For the Northern District of California

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